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No. 09-197

Supreme Court, U.S.
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In The Supreme Court of the United States

KIMCO OF EVANSVILLE, INC.
N/K/A KCH ACQUISITION, INC.,
THE FRANKLIN LIFE INSURANCE COMPANY
AND
VANDERBURGH COUNTY, INDIANA,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the
Indiana Supreme Court

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Issues involve besides Kimco, owners, tenants, financial institutions and law firms concerned with conflicts with federal laws and violations of the United States Constitution likely to occur by states following the precedent of Indiana Court's decision if its decision stands.

One feature of State's Response is failure to address federal courts decisions recognizing landowner's right to severance damages in partial condemnation cases. Another is avoiding recognizing substantial impairment of ingress or egress of Plaza East, uncontroverted by State.

Here is quotation from Indiana Supreme Court opinion creating the constitutional issue:

> "I. The Constitutional Background
>
> Article 1, section 21 of the Indiana Constitution provides that "No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." The Fifth Amendment of the U.S. Constitution similarly provides that "nor shall private property be taken for public use, without just compensation." The Fifth Amendment's Takings Clause applies to

the states via the Due Process Clause of the Fourteenth Amendment (cases cites). We have held that the state and federal takings clauses are textually indistinguishable and are to be analyzed identically, *Cheatham v. Pohle*, 789 N.A.2d, 467, 472-73 (Ind.2003) (citing *B & M Coal Corp. v. United Mine Workers of Am.*, 501 N.E.2d 401, 406 (Ind. 1986).

There is no question that an exercise of eminent domain, such as the condemnation of the 0.154 acre strip in this case, is a constitutional "taking." Other forms of governmental action, however, are "takings" only if they meet the prevailing federal standard, which is that government action affects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Factors considered under the foregoing text include the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action. *Penn Cem. Transp. Co. v. New York City*, 438 U.S. 164, 124, 98 S.Ct. 2646,

57 L.Ed.2d 631 (1978). The effects of the road improvements on Plaza East, if viewed separately from the taking of the 0.154-acre strip, plainly do not meet the *Lingle* test. Presumably for this reason Kimco presents its case in terms of Indiana case law. Because recent constitutional takings cases to some extent have modified Indiana case law, a discussion of these constitutional cases is useful background."

Argument Rebutting Respondent

I. Violation of Kimco's rights under Fifth and Fourteenth Amendments first occurred when Indiana Court issued its decision. Previously, Kimco had the jury verdict; the trial judge denied State's motion to set it aside; unanimous affirmance by Indiana Court of Appeals.

After Indiana Supreme Court's reversal based on theory contradicting federal court decisions requiring severance damages, Kimco petitioned Indiana Court to re-argue and at that time – it's earliest opportunity – responded to the federal issue, referring to Fifth Amendment. Kimco's Petition For Rehearing stated:

"This Court should rehear this case because:

A. Its decision failed to follow Federal and State eminent domain jurisdiction by

incorrectly applying a regulatory taking analysis under *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), and *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570 (Ind. 2007), to a physical taking. Because the State initiated condemnation, a regulatory analysis is improper. Kimco's damages are a direct consequence of the taking of its property rights under the Takings Clause of the Fifth Amendment of the United States Constitution....

B. This Opinion [by Indiana Court] makes sweeping pronouncement that, as long as existing access points remain intact (which was not the case here) "as a matter of law...(there) is not a deprivation of a property right." (Opinion at 12). This holding further conflicts with this Court's opinion in *State v. Marion Circuit Court*, 153 N.E.2d 327 (Ind. 1958), where this Court said:

> [If] rights of access are property or property rights which the state may acquire by condemnation as specified in the Limited Access Statute, it is difficult to see how the acquisition of such rights of access could not constitute a taking of property but only a nebulous or intangible consequential injury giving rise to no claim for damages,

as contended by petitioner."

* * *

The Rehearing Petition continues:

"A. The Opinion Improperly Applies A Regulatory Taking Analysis To An Actual Taking

The State of Indiana filed its Complaint for Appropriation of Real Estate to acquire a portion of Kimco's Plaza East shopping center for a highway improvement project and specifically included in the taking "access rights to [Kimco's] real estate...TOGETHER with the permanent extinguishment of all rights and easements of ingress and egress to, from, and across the limited access facility... to Lloyd Expressway and Green River Road..." (App. P. 23-25). This is not an inverse condemnation case. Nor does it involve a regulatory taking. The State physically took a portion of Kimco's land in fee simple absolute by condemnation... and specifically and permanently condemned a significant portion of Kimco's access right. If, as the Opinion concludes, this was a regulatory taking, no condemnation action would have been filed; the taking would occur by government fiat or the landowners would have been forced to bring an action for inverse condemnation.

The Opinion recognizes that the State's condemnation of Kimco's property is a constitutional taking under the Fifth Amendment of the Constitution ... but then goes on to analyze whether certain of Kimco's damages are a "taking" under the regulatory analysis set forth in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005) (Op. p. 6: "The effects of the road improvements on Plaza East...plainly do not meet the *Lingle* test"). This regulatory analysis is contrary to the United States Supreme Court's jurisprudence.

The plain language of the Fifth Amendment requires payment whenever the government acquires property as a result of a condemnation action. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002). The United States Supreme Court has made it clear that the State has a "categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes the entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council*, 535 U.S. at 322, citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951). On the other hand, regulatory takings involve complex factual assessments of the purposes and economic effects of the government actions. *Yee v. Escondido*, 503 U.S. 519, 523 (1992).

Given this fundamental distinction, the United States Supreme Court has held that it is inappropriate to use cases involving regulatory takings as controlling precedent for cases involving physical takings. *Tahoe-Sierra Preservation Council*, 535 U.S. at 323-324. See also *Norman v. U.S.*, 63 Fed. Cl. 231, 252 (Fed. Cl. 2004) ("Having determined that there has been no physical taking...the court must now analyze whether a regulatory taking...occurred"); *Kemp v. U.S.*, 65 Fed. Cl. 818, 822 (Fed. Cl. 2005) (Plaintiff's claim "falls into the category of physical takings...therefore...rendering a regulatory takings analysis inapplicable").

The Opinion ignores the difference between regulatory takings and physical takings and applies *Biddle v. BAA Indianapolis LLC*, 860 N.E. 2d 570, 577 ((Ind. 2007), which harmonized Indiana law with the prevailing standards of *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). In *Biddle*, this Court adopted the modern test for regulatory takings claims, holding a regulation effects a taking "if it deprives an owner of all or substantially all economic or producti8ve use of his or her property." 860 N.E. 2d at 577. By applying a regulatory analysis to the physical appropriation of Kimco's property, not only is the Court' decision contrary to federal law, but also it bars Kimco (and any similarly situated future property owner) from submitting

evidence of the consequential damages it suffered from the State's physical taking.

More importantly, the United States Supreme Court has stated that "when the government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 691 (1999) (emphasis added). "Liability simply is not an issue. Id. The filing of the condemnation action is an admission by the State that just compensation is owed for the rights condemned.

The Complaint here is clear and unambiguous. The State acquired "fee simple title... and access rights" to the shopping center's entire footage on Green River Road and also acquired the right to completely shut down both entrances (which it did) for 4-1/2 years. This Court should not, under the guise of a regulatory analysis, protect the State from the damages caused by its choices and its actions."

Indiana Court, drawing upon United States Constitution and United States Supreme Court cases as authority, was aware of the constitutional issue. *It created the issue*, and had opportunity to deal with it in the Rehearing. Instead, it denied Rehearing.

Additionally, no existing state, judicial decision or event which could be violation of federal rights existed before Indiana Court decision. In Respondent's cited cases, there was an existing occurrence. In *Street*, it was arrest for disorderly conduct. In *Webb*, court decree. In *Exxon*, Alabama's passage of oil and gas tax. In *Rotary Intl.*, gender discrimination by termination of Rotary Club's membership in the International organization which precluded women members. In *Adams*, a lower court decision.

The issue is Kimco's right to severance damages not State's right to appropriate property.

When the issue first arose (by Indiana Court decision), Petitioner rebutted it in the only manner available: Petition to reargue, explicitly citing federal cases. In less compelling circumstances, Supreme Court allowed such procedure (*Hathorn v. Lovarn*, U.S. 255 (1982); New York ex.Rel. *Bryant v. Zimmerman*, 278 U.S. 63 (1928); *Meyer v. Richmond*, 172 U.S. 82 (1898).)

Indiana Court having full opportunity to address the issue denied Rehearing. By Indiana Court's silence, Petitioner cannot in fairness be penalized by this Court. Requiring Petitioner to raise Fifth Amendment issue earlier than Indiana Court's decision would be draconian.

The facts of this case, recited in two Indiana

State Court opinions and in this Petition proceeding provide a record on which to base a decision to grant Petitioner's Writ; sufficient also for the full Court afterwards to render decision.

Respondent's argument of not raising federal issue is not persuasive.

II. Respondent asserts Kimco argues that State by condemning a "nearby" strip of land and built a median changing the traffic pattern in front of the property effectuated taking of the shopping center's property insofar as it caused that property to lose value, adding median was built "exclusively" on State's "pre-owned property – not on Kimco property that the State condemned." (Median extended the length of Plaza East ending at Northern Entrance.)

State ignores use of condemned land as indispensible to the project for creating the acceleration/merge lane and painting solid white line discouraging potential shoppers from moving into the acceleration/merge lane to enter Southern Entrance; also producing dangerous four-way intersection at Northern Entrance and preventing its expansion.

Without Kimco's land, State could not accomplish its goals. Forcing Northern Entrance into four-way intersection and painting white line are proximate causes of Kimco 's impairment of access, not, the median.

Plaza East is not "surrounding property"; not "others" property. *Campbell* case and *United States v. 50 Acres of Land* case and *Loretto* and *W. Va. Pulp & Paper Co.* cited on page 11 by State are inapposite. The law inapplicable, their facts do not compare to this case.

Curry v. Waverly & N.Y. Bay R. Co., Respondent's Brief page 13, involves partial condemnation case. Court stated, as to partial condemnation, 52 N.J.L. 381, 391, 20 A. 56, 57: "Within the tract thus owned his rights are twofold – First, he is to be paid the value of the land included in the petition of the condemning agent; and, secondly, he is entitled to an award of such damages as result to the residue of his tract."

Sharp v. United States, 191 U.S. 346 (1903) is only partially applicable. The claim was also for damage to land on an adjoining separate parcel. Compensation was denied for that. As to partial condemnation aspect, the Syllabus states: "Where the government condemns part of a parcel of land, the damage to the *remainder of the parcel* arising from the probable use which the government will make of the part taken is the proper subject of award."

Indiana Court presents issues affecting the real estate industry. Unless overruled, it perpetrates violation of Petitioner's right for severance damages caused by impairment of access

reducing market value of remaining Plaza East.

The importance is signified by amicus brief of International Council of Shopping Centers ("ICSC") and National Association of Real Estate Investments Trusts ("NAREIT").

Before Indiana Court, amicus brief was filed by Indiana Association of Cities and Towns and The Indiana Municipal Lawyers Association.

Many eyes look to this Supreme Court to pronounce the constitutional standard under the Fifth Amendment applicable to the States.

ICSC's members are retail related. NAREIT's members engage in retail, offices, industrial and lodging.

ICSC holds law conference for lawyer members. Lectures, Seminars and informative programs discuss legal subjects. Cases such as this have great interest to their attorneys.

Intense interest in the historical importance of this Writ is shown. Historical because Indiana Court's decision, besides flawed overrides United States Supreme Court decisions.

If a lender desires making a loan in any state, risking millions, and the property may be threatened by a partial condemnation, will its borrower be protected by Fifth Amendment? That is a dilemma

until this United States Supreme Court speaks.

Ability to safely and suitably enter or leave is not traffic flow. Access is recognized as a property right in Indiana. *State v. Lovett*, 254 Ind. 27, 257 N.E.2d 298 (1970); *Jenkins v. Bd. of County Comm'rs of Madison County*, 698 N.E. 3d 1268 (1998). Typical is *City of Houston v. Precast Structures, Inc.*, 60 S.W. 3rd 331 (2001). Access is so vital Texas places it in a special category and awards damages for impairment even where no part of owner's land is taken.

Kimco's property is taken along the road integrated in the project making it the acceleration/merge lane. That lane affects only Plaza East's Southern Entrance. To discourage vehicles from moving into the acceleration lane State painted white line.

State might claim to benefit retailers by enlarging trade area, as potential customers drive from longer distances. State could have proved benefits as an offset to Kimco's award. State did not introduce such evidence.

Hypothetically if Plaza East were benefited, customers from the more distant trade area arriving would find inability to get in or out. That harm is special and peculiar to Plaza East. And State prohibited changing the access to deal with the harm.

North of Plaza East is a regional mall and other competing centers, within walking distance. None are affected adversely by the condemnation project. Plaza East's injury is not shared by the community. Those retailers may benefit, but Kimco, denied severence damages, foots the bill if Indiana Court decision prevails.

This violates Fifth Amendment. In *Armstrong v. United States*, 364 U.S. 40 (1960), the Court stated,

> "This Court has recognized that the Fifth Amendment's guarantee is to bar government from forcing some people alone to bear public burdens which, in all justice and fairness, should be borne by the public as a whole."

Northern Entrance, became non-functionable because State, desirous of avoiding damage award, constructed an unworkable plan. A functioning two lane access point was turned into a Frankenstein four-way intersection without a traffic light, using same two-lane Northern Entrance prior existing for right out only. Indiana Court cites leaving Northern Entrance being physically in the same as before as example that nothing changed by condemnation. Indiana Court cites *Lingle* as authority for turning this into inverse condemnation case.

Respondent page 5 quotes Indiana Court that "neither the construction of the median alone, nor

the hypothetical conversion of Green River Road to a one-way street would have constituted a compensable taking by the State; implying Kimco cannot be compensated. State did not construct median alone; it did, much more; facts of "much more" are ignored by Indiana Court. More significantly, if the Road were made one-way street, all properties on that street – the public – would share the effect. In this case, only Kimco was the victim.

CONCLUSION

The Writ prayed for by Kimco's Petition should be granted.

DATED: December 15, 2009

Respectfully submitted,

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